No. 55.

Brief of Olcott for Appellee.

Filed Oct. 4, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.
No. 276.

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JOHN H. SCUDDER, ADMINISTRATOR OF JOHN F. HOUDAYER, DECEASED,

Plaintiff in Error,

vs.

THE COMPTROLLER OF THE CITY AND COUNTY OF NEW YORK,

Defendant in Error.

BRIEF OF ARGUMENT IN BEHALF OF THE COMPTROLLER OF THE CITY OF NEW YORK, DEFENDANT IN ERROR AND APPELLEE.

EMMET R. OLCOTT,
Attorney and of Counsel for Defendant in Error and Appellee,
35 Broadway, New York City.

Supreme Court of the United States,

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Plaintiff in Error,

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BRIEF OF ARGUMENT IN BEHALF OF THE COMPTROLLER OF THE CITY OF NEW YORK, DEFENDANT IN ERROR AND APPELLEE.

Statement of Facts.

The decedent, John F. Houdayer, died May 21, 1895, intestate, and a resident of the State of New Jersey.

Decedent *in January*, 1876, opened an account with the Farmers' Loan and Trust Company (of the City of New York), as trustee under the will of Edmund Husson (see p. 6, Printed Case), in which, from time to time, he made deposits belong-

ing to said trust estate, and as appeared by his private books of account, he also, from time to time, made deposits of money belonging to himself individually. These deposits were subject to sight draft, were frequently drawn on by check by decedent, and were maintained constantly as an open running account from the date of the first deposit to the time of decedent's death, at which time the total amount of such deposits was $73,715, of which his individual deposits, as shown by his own books of account, amounted to $71,715.

On the petition of the Comptroller of the City of New York, in the County of New York, the person designated by law to represent the State of New York, in such county, the Surrogate of the County of New York under the provisions of the then transfer tax act of the State of New York, known as Chapter 399 of the Laws of 1892, appointed an appraiser to appraise the property of the decedent, John F. Houdayer within the State of New York, at the time of his death, subject to the tax imposed by the said act.

Notices were sent by the Appraiser to all the parties in interest and John H. Scudder, administrator of the goods, chattels and credits which were of the said John F. Houdayer, deceased, the plaintiff in error, appeared before such appraiser by his attorney J. Culbert Palmer, who is his attorney of record in this Court.

Page 6, printed case.

The appraiser appointed by the Surrogate reported that the estate of the decedent consisted of cash on deposit with the Farmers' Loan and Trust Company of New York in the amount of $71,715, that the *pro rata* of debts and expenses of administering the estate amounted to $3,500, leaving a net personal estate in New York subject to such tax amounting to $68 215. On this report the usual order was entered, as of course (January 17, 1896) fixing the tax. From such order the administrator appealed to the

Surrogate, who affirmed the first order by another order (January 21, 1896), from which the Plaintiff in Error appealed to the Appellate Division of the Supreme Court of the State of New York for the First Department which reversed the order of the Surrogate. Thereupon, the Comptroller of the City of New York appealed to the Court of Appeals of the State of New York, which reversed the order of the Appellate Division referred to and appealed from, and affirmed the order of the Surrogate.

The plaintiff in error thereupon filed a writ of error and cited the Comptroller of the City of New York to appear in this Court.

The plaintiff in error assigns as his grounds in error--

FIRST.

That the property in question being situated in the State of New Jersey, of which State also the decedent was a resident at the time of his decease, the laws of the State of New York have no application thereto, nor have the courts of New York jurisdiction thereof.

SECOND.

That by the law as interpreted by the decision and judgment herein, the Legislature of the State of New York attempts to exercise jurisdiction beyond the State, and to affect contracts and rights of a citizen of another State which are protected by the Constitution and laws of the United States and the judicial power granted to its courts, and violates and interferes with the sovereignty of the State of New Jersey.

THIRD.

That the act of the Legislature of the State of New York herein referred to as applied to the facts and circumstances of this case or the act done under the authority of the State of New York here com-

plained of is unconstitutional and void as being repugnant to Section 10 of Article 1 of the Constitution of the United States, in that it impairs the obligation of the contract between a non-resident depositor and the Farmers' Loan and Trust Company of New York.

FOURTH.

That the said act of the Legislature as interpreted by the decisions herein is repugnant to the Fifth Amendment of the Constitution of the United States, which provides that private property shall not be taken for a public use without just compensation.

FIFTH.

The said act of the Legislature as interpreted by the decision herein is repugnant to Section 1 of the 14th Amendment of the Constituiton of the United States, by which States are forbidden to deprive citizens of life, liberty, or property without due process of law.

The contention of plaintiffs in error before the Court of Appeals of the State of New York was that decedent mingled his own funds with those of the trust estate of Edmund Husson, and that his representatives, on his decease, succeeded merely to a right to an action for an accounting, which, having been held, the administrator would still hold merely a chose in action in the nature of a claim against the Trust Company; that the situs of a debt is the domicile of the creditor and not of the debtor; that the property in or claim to the deposit was never located in the State of New York; that a debt held by the estate of a non resident decedent against a resident of the State of New York was not taxable under the act in question, for there must be some definite entity, some distinct parcel of actual

property, tangible or well-defined, located within the State of New York, or that if the deposit in the Trust Company could be regarded as in the nature of property, it was not taxed, because property transiently within the State of New York is not taxable.

But the record below fails to disclose that any Federal question sought to be raised here was presented in the State Court.

Whatever issues are in the case will be found in the petition of the Comptroller of the City of New York (p. 3 of the Record), in the affidavits of the plaintiff in error (pp. 6, 7, 8 of the Record), and in the notice of appeal of the plaintiff in error (p. 10 of the Record) from the order made by the Surrogate of New York County—acting as Assessor—"as of course" to the Surrogate acting as a Judicial officer on the appeal.

The petition of the Comptroller (p. 3 of the Record) alleged. His official position;

The death of the decedent in New Jersey and his ownership of property in the State of New York;

The appointment of plaintiff in error with Louise Hondayer as decedent's administrators;

That no application had been made to the courts of New York for administration on decedent's estate, being certain moneys on deposit in the State of New York, which decedent's administrators endeavored to remove without payment of the tax fixed by law under the transfer tax act or application for an appraiser to appraise decedent's property under such act, which was subject to the tax imposed by such act;

The names of the persons entitled to decedent's property under the laws of New Jersey and the names and addresses of all parties interested.

In his first affidavit (p. 8 of the Record) plaintiff in error states: "Deponent further says that he "understands and believes that proceedings have "been instituted by the authorities of the State of "New York to appraise, for the purpose of levying

" a tax thereon, the property of decedent within " the State of New York, in which he believes it is " intended to include the amount on deposit in the " Farmers' Loan and Trust Company as aforesaid. " Deponent further says that he objects to such " proceedings, and opposes a levy of any such tax " upon such amount so on deposit *and claims that* " *said deposit is exempt under the laws, and not* " *subject to taxation.*"

The second affidavit is not material to the issue.

In his notice of appeal hereinbefore referred to, plaintiff in error states (p. 10 of the Record) that the ground of his appeal is "that the de- " posit in the Farmers' Loan and Trust " Company of $71,715 standing at the time of " decedent's death in his name as trustee, was a " chose in action belonging to a non-resident dece- " dent and *not property within this State* " (that is, the State of New York) " *subject to taxation under* " *the provisions of the Act in relation to taxable* " *transfers of property;* that the situs of the claim " of decedent against such deposit was at the domi- " cile of the decedent and not at the domicile of the " said depository, *and such property being the prop-* " *erty of a non-resident decedent and situated out of* " *this State* " (that is, the State of New York) " *the* " *same does not fall within the purview of said* " *Act. Even if regarded as property within this* " *State* " (that is, the State of New York) " *it is not* " *taxable thereunder*, because such property was " only transiently within this State " (that is, the State of New York).

"In any event, the expenses of administering the " estate should be deducted from the amount of the " deposit."

The issues thus raised were not changed in any- wise during the entire case.

In the notice of appeal by plaintiff in error (p. 12 of the Record), from the order of the Surrogate of New York County to the Appellate Division of the New York Supreme Court for the First De-

partment, he appeals "to the Appellate Di-
"vision of the Supreme Court from the
"order entered herein on the twenty-first
"day of January, 1896, which affirmed the order
"made on the seventeenth day of January, 1896,
"fixing the transfer tax due on the interests of the
"parties entitled to the estate of said decedent."
The notice of appeal by the Comptroller of the City of New York to the Court of Appeals (p. 3 of the Record) merely appeals from the order of the Appellate Division to that Court.

The report of the opinion of the New York Court of Appeals shows that it assumed it was dealing solely with Chapter 399 of the Laws of 1892 of the State of New York.

As to the motion to dismiss the case.

The Federal questions sought to be raised here, not having been presented in the State Court, the case should be dismissed for want of jurisdiction.

This point has been repeatedly passed upon by this Court.

In Murdock *v.* City of Memphis, 20 Wall, 590, Mr. Justice Miller, delivering the opinion of the Court, says: "Finally, we hold the following propositions
"on this subject as growing from the statute as it
"now stands:

"That it is essential to the jurisdiction of this
"Court over the judgment of the State Court that
"it shall appear that one of the questions men-
"tioned in the act must have been raised and pre-
"sented to the State Court."

In Moore *v.* Miss., 21 Wall, 638, the Chief Justice, delivering the opinion of the Court, said:

"We are not required to re examine the judg-
"ment of the said Court simply because a Federal

"question may have been decided. To give us "jurisdiction, it must appear that such a question "was necessarily involved in the decision."

Armstrong *v.* Treas. of Athens Co., 16 Peters, 282.

In Winona & St. Peter Land Co. *v.* Minnesota (No. 2), 159 U. S., 540, the Court held that the Federal question sought to be raised here, not having been presented to the State court, the case must be dismissed for want of jurisdiction. Mr. Justice Brewer delivering the opinion of the Court cited the following cases:

Spies *v.* Illinois, 123 U. S., 131, 181.
Brooks *v.* Missouri, 124 U. S., 394.
Chappell *v.* Bradshaw, 128 U. S., 132.
Brown *v.* Massachusetts, 144 U. S., 573.
Schuyler National Bank *v.* Bollong, 150 U. S., 85.
Powell *v.* Brunswick County, 150 U. S., 433.
Miller *v.* Texas, 153 U. S., 535.
Morrison *v.* Watson, 154 U. S., 111.
Sayward *v.* Denny, 158 U. S., 180.
See also Leydon *v.* Davis, 170 U. S., 36.

In Rutland R. R. Co. *v.* Central Vermont R. R. Co., 159 U. S., 630, Mr. Justice Gray, delivering the opinion, this Court held:

It is well settled, by a long series of decisions of this Court, that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed without considering the Federal question.

Murdock *v.* Memphis, 20 Wall., 590.
Jenkins *v.* Lowenthal, 110 U. S., 222.
Beaupre *v.* Noyes, 138 U. S., 397.

Walter A. Wood Co. *v.* Skinner, 136 U. S., 293.
Hammond *v.* Johnston, 142 U. S., 73.
Tyler *v.* Cass County, 142 U. S., 288.
Delaware Co. *v.* Reybold, 142 U. S., 636.
Eustis *v.* Bolles, 150 U. S., 361; in the last two of which many other cases to the same effect are cited.

In Union National Bank *v.* Louisville, New Albany & Chicago R. R. Co., 163 U. S., 325, Mr. Justice Brewer delivering the opinion, this Court held:

"At the outset we are met with the question "whether this Court has jurisdiction." In Eustice *v.* Bolles, 150 U. S., 361, 366, it was held:

"It is likewise settled law that, where the record "discloses that if a question has been raised "and decided adversely to a party claiming the "benefit of a provision of the Constitution or "laws of the United States, another ques- "tion, not Federal, has been also raised and de- "cided against such party, and the decision of the "latter question is sufficient, notwithstanding the "Federal question, to sustain the judgment, this "Court will not review the judgment."

In Oxley Stave Co. *v.* Butler County, 166 U. S., 648, Mr. Justice Harlan, delivering the opinion, this Court held: "That the Court cannot review the "final judgment of the highest court of a State "even if it denied some title, right, privilege or "immunity of the unsuccessful party, unless it ap- "pear from the record that such title, right, privi- "lege or immunity was 'specially set up or claimed' "in the State court as belonging to such party under "the Constitution or some treaty, statute, commis- "sion or authority of the United States (Rev. Stat., "Sec. 709)."

The words "specially set up or claimed" in that section imply that if a party in a suit in a State court intends to invoke, for the protection of his

rights, the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare, "specially," that is, unmistakably, this Court is without authority to re examine the final judgment of the State court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference.

In Levey *vs.* Superior Court of San Francisco, 167 U. S., 175, Mr. Justice Harlan, delivering the opinion, this Court held, following the case of Oxley Stave Co. *v.* Butler, 166 U. S., 648, that "the jurisdiction "of this Court to re-examine the final judgment of "a State court cannot arise from inference, but "only from averments so distinct and positive as to "place it beyond question that the party bringing a "case here from such Court intended to assert a "Federal right."

In Miller *v.* Cornell R. R. Co., 168 U. S., 131, Mr. Chief Justice Fuller, delivering the opinion, the Court held, that if the ground on which the jurisdiction of this Court is invoked to review a judgment of a State court is, that the validity of a State law was drawn in question as in conflict with the Constitution of the United States, and the decision of the State court is in favor of its validity, this must appear on the face of the record before the decision below can be re-examined here.

A suggestion of such appearance, made on application for reargument, after the judgment of the trial Court is affirmed by the Supreme Court of the State, comes too late.

This Court has no jurisdiction on a writ of error to a State court to declare a State law void on account of its collision with the State Constitution.

An objection in the trial of an action in a State court that an act of the State was "unconstitutional and void" when construed in those courts as raising the question whether the State Legislature had power, under the State Constitution, to pass the act,

and not as having reference to any repugnance to the Constitution of the United States, is properly construed.

The report of this case in the Supreme Court of Pennsylvania shows that it assumed that it was dealing, under the assignments of error, only with the State Constitution.

In Muse *v.* Arlington Hotel Company, 168 U. S., 430, Mr. Chief Justice Fuller delivering the opinion, the Court held:

> A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument; but a definite issue in respect to the possession of the right must be distinctly deducible from the record, before the judgment of the Court below can be revised on the ground of error in the disposal of such a claim by its decision.

The same rule being applicable in respect of the validity or construction of a treaty, some right, title, privilege or immunity, dependent on the treaty, must be so set up or claimed as to require the Circuit Court to pass on the question of validity or construction in disposing of the right asserted.

In respect of the plaintiffs' case as stated in their complaint, the Circuit Court decided no question as to the application or construction of the Constitution, or the validity or construction of the treaty, and this Court is without jurisdiction to review the action of that Court.

In Kipley *v.* Illinois, 170 U. S., 186; this Court held, Mr. Justice Harlan delivering the opinion:

> " We are of opinion that this Court is without " jurisdiction to review the final judgment of the " Supreme Court of Illinois in these cases. The " answer makes no reference whatever to the Con- " stitution or laws of the United States. It is true " that it avers that the Illinois Civil Service Act

"was 'unconstitutional and void.' But when "the jurisdiction of this Court is invoked for "the protection against the final judgment of "the highest Court of a State, of some title, "right, privilege or immunity secured by the "Constitution or Laws of the United States, it "must appear expressly or by necessary intend- "ment, from the record, that such right, title, "privilege or immunity, was 'specially set up or "claimed' under such constitution or laws (Rev. "St., 709). Our jurisdiction cannot arise in such "case from inference, but only from averments so "distinct and positive as to place it beyond question "that the party bringing the case up intended to "assert a Federal right (Oxley Stove Co. *vs.* Butler "Co., 166 U. S., 648; Levey *vs.* Superior Court of "San Francisco, 167 U. S., 175, 177)."

The averment in the answer that the Statute "of Illinois was unconstitutional and void must be "taken as intended to apply to the Constitution of "that State, and not to the Constitution of the "United States. In Miller *v.* Cornwall R. R., 168 "U. S., 131, 134, this Court, speaking by the Chief "Justice, said: 'We have no jurisdiction in a writ of "error to a State court to declare a State law void "on account of its collision with a State Constitu- "tion, and it was long ago held that where it "was objected in the State courts that an "act of the State courts was unconstitu- "tional and void,' the objection was construed "in those courts as raising the question whether "the State Legislature had the power under the "State Constitution to pass the act, and not as hav- "ing reference to any repugnance to the Constitu- "tion of the United States (Porter *vs.* Foley, 24 "How., 415)."

"It is manifest that when the answer was drawn "neither the defendant Kepley nor the learned "counsel representing him intended to raise any "Federal question. We cannot suppose that it

" occurred to either of them at that time that the " Civil Service Act of Illinois was repugnant to the " Constitution of the United States."

As to the merits of the judgment of the State court imposing the tax under Chapter 399, Laws of New York, 1892.

I.

This Court has held that such tax " is not on money ; it is on the right to inherit and hence a condition of inheritance."

Such are the very words of this Court as expressed in

Magoun *v.* The Illinois Trust & Savings Bank, 170 U. S., 283-294.

Now, the right of the representatives of Houdayer, the deceased, in the case at bar, to take the fund in the Farmers' Loan and Trust Company of New York, a corporation created under the laws of the State of New York, was a statutory privilege conferred by the State of New York, and therefore the authority which confers it may impose conditions on it, that is by requiring payment of a transfer tax before letting it go. It has done so, and this Court has declared the same constitutional.

Magoun *v.* The Ill. Trust & Savings Bank (*supra*).

United States *v.* Perkins, 163 U. S., 625-631.

What are these limitations or restrictions imposed by the State of New York?

The State " appropriates for its own use a portion

of the property *at the moment of its owner's decease* and allows only the balance to pass."

Matter of Swift, 137 N. Y., 77.

Matter of Merriam, 141 N. Y., 484:

"The State limits the power of testamentary disposition, and legatees and devisees take their bequests and devises subject to this tax imposed on the succession of property."

Matter of Merriam, 141 N. Y., 484:

"A certain deduction shall be taken which is to be paid into the public treasury and for convenience is called a tax."

Matter of Hamilton, 140 N. Y., 213:

"The State is made one of the beneficiaries. It lays its hands under such circumstances and claims a share."

Clymer *v.* Commonwealth, 2 P. F. S., 186:

"If the law-making power of the State *where the property happens to be situated or the debtor of the deceased reside*, to subserve its own policy, has engrafted qualifications or restrictions upon the rights of those who would succeed to the estate by the law of the domicile, *they must take their rights subject to such restrictions.*" * * *

Peterson *v.* Chemical Bank, 32 N. Y. 44.

In the matter of Swift, 137 N. Y., 77, the learned Judge who wrote the opinion says (p. 86): "As to goods and chattels, their transmission is subject to the permission of and regulated by the laws of the State where situated. Jurisdiction over them belongs to the courts of the State or the country for all purposes of policy or of administration in the interests of its citizens or of those having enforceable rights."

The Legislature of New York provided by Section 2694 of the Code of Civil Procedure of the State of

New York that testamentary disposition or descent of real property not disposed of by a will shall be regulated by the laws of the State without regard to the residence of a decedent, and further in these words, "*except where special provision is otherwise* " *made by law* the validity and effect of a testa- " mentary disposition of any other (that is, per- " sonal) property situated within the State, and " the ownership and disposition of such property, " where it is not disposed of by will, are regu- " lated by the laws of the State or country of which " the decedent was a resident at the time of his " death."

Section 2514 of the same Code prescribes the rule as to what constitutes " personal property." It declares " the expression 'personal property' signifies every kind of property which survives a decedent, other than real property," as defined in the same subdivision; and that the expression " real property " includes " every estate, interest and right, legal or equitable, in lands, tenements or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are declared by law to be assets."

" Assets " by the same section are defined to signify " *personal* property applicable to the debts of the decedent."

As to the authority to issue ancillary letters under Sections 2695 and 2696 of the Code by " the Surrogate's Court having jurisdiction of the estate," the existence of property in this State is the sole condition precedent, and the Surrogate having jurisdiction of the estate *must* issue letters ancillary.

By Section 2701 of the Code the person having ancillary letters may not only be required to pay the debts of the decedent due local creditors out of the money or avails of property received under the ancillary letters, but also " *to distribute the same among legatees or next of kin, or otherwise dispose of the same as justice requires.*"

The cogent language of Section 2694 of the Code,

"*except where special provision is otherwise made by law,*" stands boldly forth in the reservation made by the Legislature, and such special reservation and provision as a limitation upon the right of the non-resident to take away any property without the payment of the transfer tax, is found in Chapter 399 of the Laws of 1892:

FIRST.—Section 1 provides that "*all property,*" real and personal, shall be taxed, except as exempted.

SECOND.—Section 3 requires that the tax imposed "*shall be and remain a lien* upon the property transferred until the tax be paid."

THIRD.—Section 10 limits the right to ancillary letters testamentary and of administration by providing that the petition must state the value of the property of the non resident, and that the County Treasurer or Comptroller must be cited and upon the return of the citation the Surrogate must fix the amount of tax and the decree treat the County Treasurer or Comptroller *as a creditor of the decedent.*

Then in order to safeguard the claim of the State to its transfer tax on the property of non-residents against the possible contingency that foreign executors, administrators or trustees without coming into the State for letters testamentary, or of administration, or the recognition here of foreign deeds of trust, might or could assign or transfer any stock *or obligations* in this State standing in the name of the decedent or in trust for the decedent or demand delivery and receive other securities or *assets*, the Legislature made a sweeping direction in Section 9 of the Act that no such transfers of stock or obligations should be made *without payment of the tax*, and no delivery made of such securities or *assets* without notice to the County Treasurer or Comptroller.

Thus we find in Section 10 of the Act provisions

relating to cases where ancillary letters testamentary or of administration are applied for in this State, and in Section 9 the rule as to all other cases.

Section 9 of the Act referred to is given in the next paragraph.

FOURTH.--Section 9 of the act says: "If a foreign executor, administrator or trustee shall assign or transfer any stock *or obligations* in this State standing in the name of a decedent, or in trust for a decedent, liable to any such tax the tax shall be paid to the treasurer of the proper county or the Comptroller of the City of New York on the transfer thereof. No safe deposit company, bank or other institution, person or persons holding securities *or assets* of a decedent, shall deliver or transfer the same to the executors, administrators or legal representatives of said decedent unless notice of the time and place of such intended transfer be served upon the County Treasurer or Comptroller at least five days prior to the said transfer."

These provisions, with the Code provisions as to wills, inheritances and distributions of the estates of non-residents, clearly show that the Legislature, having the right to regulate the transfer of property within its limits, bearing in mind that whoever sends property in such territory impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction of the domicile of the owner,

(Green *v.* Van Buskirk, 5 Wall, 307.
Hervey *v.* Locomotive Works, 93 U. S., 671.
Harkness *v.* Russell, 118 U. S., 679.
Walworth *v.* Harris, 129 U. S., 355.)

and taking into account that unless restrained by the provisions of the Federal Constitution, the power of the State as to the mode, form and extent

of taxation, is unlimited where the subjects to which it applies are within her jurisdiction, as set forth *in a few only* of the authorities next following—

(Matter of Sherwell, 125 N. Y., 379.
Matter of McPherson, 104 N. Y., 316.
People *v.* Equitable Trust Co., 96 N. Y., 387.
Stuart *v.* Palmer, 74 N. Y., 183.
Gardner *v.* Carnes, 47 N. Y., 608.
People *v.* Lawrence, 41 N. Y., 137.
Howell *v.* City of Buffalo, 4 Tr. App. R., 505.
Brewster *v.* City of Syracuse, 19 N. Y., 116.
The Town of Guilford *v.* Board of Supervisors, 3 Kern R., 143.
People *v.* Mayor of Brooklyn, 4 N. Y., 419.
Providence Bank *v.* Billings, 4 Peters R., 514.
Matter of Swift, 137 N. Y., 77.
Matter of Merriam, 141 N. Y., 479),

chose to limit the transfer by will, or the ownership not passing by will of property of non-residents of this State.

Nor are such provisions confined to the State of New York, for the right of the State of Massachusetts to tax the property of non-resident decedents having been questioned, it was held by the Supreme Court of Massachusetts in a recent case that the Massachusetts Statute of 1891, Chapter 425, Section 1, applies to foreign wills and the property that passes under the statutes of Massachusetts of similar import to the sections of our Transfer Tax Act and the provisions of our Code in Section 2694.

The case referred to was Callahan *v.* Woodbridge, decided by the Supreme Judicial Court of Massachusetts in August, 1898 (51 N. E. R.), 176, and the Court said that the Massachusetts Statute of 1891,

Chap. 425, Section 1, providing a collateral legacy and succession tax on all property within the commonwealth, "whether belonging to the inhabitants of the commonwealth or not, * * * which shall pass by will or by the laws of the commonwealth regulating intestate succession," applies to foreign wills, and the property that passes under Pub. St., Chap. 138, Section 1, providing that the property of a non-resident, after death, shall "be disposed of according to the laws of the State or country of which he was an inhabitant."

The Court stated:

"The appellant raises the preliminary question "whether the probate court has jurisdiction over a "case of this kind. We are of opinion that it has. "Section 14 of this chapter expressly provides that "'the probate court having jurisdiction of the settle- "ment of the estate of the decedent shall have "jurisdiction to hear and determine all questions in "relation to said tax that may arise affecting any "devise, legacy or an inheritance under this tax,' "&c. The decedent was a non-resident, and these "proceedings relate only to the property found in "this commonwealth. So far as this property is "concerned, the probate court has jurisdiction of "the settlement of the estate of the decedent (Pub. "St. C., 156, Sec. 2; *Id.*, C. 127, Secs. 15-17; *Id.*, "C., 138, Secs. 1, 2). Under the express provisions "of the section last cited it may regulate the set- "tlement of the estate, not only in regard to the "collection of assets and the payment of debts, but "it may afterwards make final distribution of the "property, or pay it over according to the will, or "may, in its discretion, cause it to be transmitted "to the executor or administrator, if any, in any "State or country where the deceased had his domi- "cile (Welsh *v.* Adams, 152 Mass., 74, 25 N. E., 84). "The question as to the liability to pay a tax is "a question affecting a devise, legacy or inheri-

" tance, under the act; for if the tax is " paid, the devise, legacy or inheritance will " be diminished by the payment. It seems " clear that the case is within the statute of 1891 " (Chap. 425, Sec. 14), *and we have no occasion to* " *inquire whether the probate court has jurisdiction* " *under other statutes* (Essex *v.* Brooks, 164 Mass., " 79, 41 N. E., 119; see St. 1891, Chap. 415; Swasey " *v.* Jaques, 144 Mass., 135, 10 N. E. 758).

" The constitutional authority of the Legislature " to lay an excise tax upon the privilege of succes- " sion to property after the death of the former " owner of it was established by this court in Minot " *v.* Winthrop (162 Mass., 113, 38 N. E., 512), and " is generally recognized by courts elsewhere (At- " torney-General *v.* Bouwens, 4 Mees. & W., 171; " Stern *v.* Reg. (1896), 1 Q. B., 211; Thompson *v.* " Advocate-General, 12 Clark & F., 1; State *v.* Dal- " rymple, 70 Md., 294, 17 Atl., 82; *In re* Romaine; " 127 N. Y., 80, 27 N. E., 759; *In re* Swift, 137 N. " Y., 77-84, 32 N. E., 1096; Orcutt's Appeal, 97 Pa. " St., 179; Small's Estate, 151 Pa. St., 1, 25 Atl., 23, " Alvany *v.* Powell, 55 N. C., 51). The legal right of " the Legislature to make such a provision in regard " to the property of a non-resident owner rests upon " the fact that the property is within the State, and " subject to its jurisdiction. This power is as large " in reference to the property of a non-resident deced- " ent as to that of the inhabitants of the common- " wealth. It covers the property within the jurisdic- " tion. A ground for its exercise is that the prop- " erty has the protection of our laws, and that our " laws are invoked for the administration of it " when a change of ownership is to be effected. " In the statute before us the succession to prop- " erty of non-residents is expressly taxed, as if the " property belonged to inhabitants of the common- " wealth. The language, 'which shall pass by " will or by the laws of the commonwealth regu- " lating intestate succession,' taken in connec- " tion with the clauses immediately preceding

"it, applies to foreign wills, *and to property* "*that passes under the statute of this com-* "*monwealth which regulates the succession to the* "*property of a non resident owner after his death,* "*and declares that it shall 'be disposed of accord-* "*ing to the laws of the State or country of which he* "*was an inhabitant'* (Pub. St., C. 138, Sec. 1).

"Upon the facts before us, there is no doubt that "all the property referred to was within the juris- "diction of this commonwealth, so as to come "within the statute, unless it be the note with "mortgage security upon land in Kansas City. "There was real estate in Boston, *there was a small* "*amount of cash on hand,* and the rest of the prop- "erty was in bonds of railroad companies, of the "City of Zanesville, Ohio, of the State of New "Hampshire, and of the United States, all of which "were completely transferrable by delivery, and "were commonly bought and sold in the market in "this commonwealth. The statute applies to prop- "erty 'tangible or intangible.' Without any pro- "vision in regard to intangible property, the prop- "erty above described would be included, because "it was all tangible, passing from hand to hand, "and was as completely within the jurisdic- "tion of our laws as ordinary chattels. * * * "The language of our statute is too clear to "admit of a doubt that such property as that to "which we have referred was intended to be cov- "ered by it. Whether the note and mortgage were "property within the jurisdiction of the common- "wealth is a different question, which, upon the "facts stated, it is not necessary to decide. * * *"

There is no inherent, natural or absolute right to inherit or succeed to property, nor to make disposition after death by bequest or devise and the right to take property is the creature of law—being lawful for the State to withhold altogether the privilege of acquiring property within its dominion by will or inheritance, it is lawful for the Legislature to annex such conditions to the privi-

lege as may seem expedient. In the exercise of this power with the Code provisions, inheritance and distribution of the estates of non-resident decedents, the Legislature of the State of New York has attached as a condition precedent for the privilege of succession to property within the State, of non-residents, that the tax known as the transfer tax shall be paid, and the person in whom the estate of the non-resident decedent vests, who comes or sends to this State to secure possession of his property, comes here posseesed only of the legal title to the property, *less the tax;* for, *eo instante,* at the moment of the death of the decedent, the State of New York "appropriates for its own use a portion of the property, and only allows the balance to pass," and the right of succession is not conferred by the laws of the State where the decedent resided and died, except as to such balance.

Such is the law of the State of New York and as recognized by this Court.

Matter of Swift, 137 N. Y., 77.
Matter of Merriam, 141 N. Y., 479.
Matter of Hoffman, 143 N. Y. 593.
Matter of Collom, 145 N. Y., 593.
Matter of Hamilton, 140 N. Y., 213.
Mager *v.* Grima, 8 How., 491.
Frederickson *et al. v.* State of Louisiana, 23 How., 447.
Wallace *v.* Myers, 38 Fed. Rep., 185.
Pollock *v.* Farmers' Loan and Trust Company, 157 U. S. Rep , 578.
United States *v.* Perkins, 163 U. S., 625.
Magoun *v.* The Ill. Trust & Savings Bank (*supra*).

"*Sic volo sic jubeo*" is the language of a sovereign, and in respect to State taxation of property within the State the State is a sovereign power.

Hence, if the State has seen fit to define what is

taxable, who can gainsay its right as to the "mode, form and *extent* of taxation?"

The principle of taxation, as the corelative of protection, perfectly just in itself, is as applicable to a non-resident as to a resident owner, because civil government is essential to give value to any form of property without regard to the ownership; and taxation is indispensable to civil government.

Nor can there be any doubt that the State has power to tax personal property, even when separated from its owner.

As observed by Mr. Justice Story (Conflict of Laws, §§ 297-311): "Although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice, that the actual situs of the thing should be examined. A nation within whose territory it is actually situate, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

The old rule expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, the rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used.

Green *v.* Van Buskirk, 5 Wall., 307; 7 Wall., 139.

Hervey *v.* Rhode Island Locomotive Works, 93 U. S., 664.

Harkness *v.* Russell, 118 U. S., 663, 679.

Walworth *v.* Harris, 129 U. S., 355.

Story on Conflict of Laws, § 550.

Wharton on Conflict of Laws, §§ 297-311.
Lewis *v.* Woodford, 58 Tenn., 25.
Birthwhistle *v.* Vardhill, 5 Barn. & C., 438-451.
Albany *v.* Powell, 2 Jones Eq., 57.
American Coal Co. *v.* County Comrs. of Allegheny Co., 59 Md., 185.
Mayor, &c., of Baltimore *v.* Baltimore City Passenger R. Co., 57 Md., 31.

For the purposes of taxation, this Court has repeatedly affirmed that personal property may be separated from its owner, and that he may be taxed on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen of the State which imposes the tax.

Lane County *v.* Oregon, 7 Wall., 71, 77.
Railroad Co. *v.* Pennsylvania, 15 Wall., 300, 323, 324, 328.
Railroad Co. *v.* Penniston, 18 Wall., 5, 29.
Tappan *v.* Merchants' Bank, 19 Wall, 490, 499.
State Railroad Tax Cases, 92 U. S., 575, 607, 608.
Brown *v.* Houston, 114 U. S., 622.
Coe *v.* Errol, 116 U. S., 517, 524.
Marye *v.* Baltimore & Ohio R. R., 127 U. S., 117, 123.

The Courts of the State of New York have followed the same principle of the separation of personal property from the owner. The question came up in the Court of Appeals in People *ex rel.* Jefferson *v.* Smith *et al.*, 88 N. Y., 580, and the Court said:

"It is undoubtedly a general rule of law that "movable property is deemed to have no situs ex- "cept that of the domicile of the owners, yet this

"being but a legal fiction, it yields whenever it is "necessary for the purpose of justice, that the "actual situs of the thing should be examined, and "whenever the legislative intent is manifested, that "this legal fiction should not operate. That choses "in action can have a situs away from the domicile "of the owner, for the purpose of taxation and for "other purposes, is frequently manifested in the "statutes of the State. In the Revised Statutes, as "amended by Chapter 176 of the Laws of 1851, it is "provided that every person shall be assessed in "the town or ward where he resides, when the as-"sessment is made, for all personal estate owned by "him, including all personal estate in his possession, "or under his control, as agent, &c , and this stat-"ute has been construed to authorize the assess-"ment of securities held by an agent in this State "for a non-resident owner."

The People *vs.* Trustees of Ogdensburgh, 48 N. Y., 390.

Williams *vs.* the Board of Supervisors, 78 *Id.*, 561.

Boardman *vs.* The Board of Supervisors, 85 *Id.*, 359.

"By Chapter 371, Laws of 1851, it is provided "that 'all debts owing by inhabitants of this State "'to persons not residing within the United States, "'for the purchase of any real estate, shall be "'deemed personal property within the town or "'county where the debtor resides, and as such shall "'be liable to taxation in the same manner, and to "'the same extent, as the personal estate of citizens "'of this State.'"

"That it was the legislative intent that such debts "for the purpose of taxation can have an existence "away from the domicile of the owner cannot be "questioned."

People *vs.* Trustees of Ogdensburgh, *supra.*

"By Chapter 37, Laws of 1855, all persons and "associations doing business in the State of New "York, as merchants, lenders or otherwise, and "non-residents of this State, shall be assessed and "taxed on all sums invested in any manner, the "same as if they were residents of this State."

"A foreign banker doing business in this State "may have his whole capital invested in securities, "and thus have nothing here but choses in action, "and yet the legal fiction that they exist at his "domicile must yield, and they are taxable here. "Under the laws of Congress and of this State, "regulating the taxation of stockholders of banks, "the shares of stock are not taxable at the domicile "of the owner, but at the place where the bank is "located, and thus again it is recognized that such "choses in action can have an existence, not at the "domicile of the owner."

See also Matter of Romaine, 127 N. Y.

In this case last cited the Court said:

"The fiction of the law that personal estate has "no *situs* away from the person or residence of "its owner is done away with, to a limited extent, "and for a specified purpose, and the truth is sub- "stituted in its stead as the rule of action. That "the Legislature had the power to do this can "hardly be questioned (Matter of McPherson, 104 "N. Y., 306).

"As was said by Judge Story when writing upon "this subject: 'A nation within whose territory "any personal property is actually situated has an "entire dominion over it while therein in point of "sovereignty and jurisdiction, as it has over im- "movable property situated there.'"

(Conflict of Laws, Sec. 550). In People *ex rel.* Hoyt *vs.* Commissioners of Taxes, 23 N. Y., 226, 228, Judge Comstock quotes with approval the fore- going extract, and adds: "I can think of no more

" just and appropriate exercise of the sovereignty " of a State or nation over property situated within " it, and protected by its laws, than to compel it to " contribute toward the maintenance of government " and law."

" *Accordingly, there seems to be no place for the " fiction of which we are speaking (mobilia per- " sonam sequuntur) in a well adjusted system of " taxation* (see also Guilland *vs.* Howell, 35 N. Y., " 657; Graham *vs.* First National Bank of Norfolk, " 95 *Id.*, 393, 601; Catlin *vs.* Hull, 21 Vermont, " 152)."

In the case of Catlin *vs.* Hull, *supra*, the Supreme Court of Vermont says:

" It is entirely just and equitable that if persons " residing abroad bring their property and invest it " in this State, for the purpose of deriving profit " from its use and enjoyment here, and thus avail " themselves of the benefit and advantage of our " laws for the protection of their property, their " property should yield its due proportion towards " the support of the Government which thus pro- " tects it."

II.

The money on deposit in the Trust Company was property subject to taxation under the act.

If we revert to the general jurisdiction of the State of New York for the purposes of taxation, we find it provided that " all lands and all personal es- " tate within this State, whether owned by indi- " viduals or corporations, shall be liable to taxa- " tion."

Sec. I., Title I., Chap. 13, Part I., R. S.

The definition of "personal estate" is given in the same statute, as follows:

"Terms 'personal estate' and 'personal property,' "whenever they occur in this chapter (p. 1, C. 13, "1 R. S.) shall be construed to include all household "furniture, *moneys*, goods, chattels, *debts due from* "*solvent debtors*, whether on account, contract, "note, bonds or mortgage, public stocks, and "stocks in moneyed corporations. They shall also "be construed to include such portion of the capital "of incorporated companies, liable to taxation on "their capital, as shall not be invested in real "estate."

Sec. 3, Title I., Chap. 13, Part I., R. S.

Such continued the statutory definition of personal property until the year 1892, when the Legislature passed Chapter 677, entitled "An Act relating to the construction of statutes constituting chapter one of the General Laws--the Statutory Construction Law, during the same session at which Chapter 399, Laws of 1892, was passed.

The relevant part of the text is as follows:

Sec. 1. * * * "This chapter shall be known "as the Statutory Construction law, and is appli- "cable to every statute unless its general object or "the context of the language construed, or other "provisions of law, indicate that a different mean- "ing or application was intended from that required "to be given by this chapter."

Sec. 2. "The term property includes real and per- "sonal property."

Sec. 3. "The term real property includes real "estate, lands, tenements and hereditaments, cor- "poreal and incorporeal."

Sec. 4. "The term personal property includes "chattels, *money, things in action* and all written

" instruments themselves, as distinguished from the " rights or interests to which they relate, by which " any right, interest, lien or incumbrance in, to or " upon property, or any debt or financial obligation " is created, acknowledged, evidenced, transferred, " discharged and defeated wholly or in part *and* " *everything,* except real property, *which may be* " *the subject of ownership.* The term chattels in- " cludes goods and chattels."

Thus we see that "*moneys*" were *inter alia* subjected to taxation under the statute prior to Chapter 677, Laws of 1892, and that in the act last referred to the term "property," as applicable to Chapter 399, declared "personal property" to be *inter alia* "*moneys*" and "*things in action.*"

The People *v.* Trustees of Village of Ogdensburgh, 48 N. Y., 397, the Court of Appeals refers to the provisions of the statute already cited (Sec. 1, Title 1, Chap. 13, Part I., R. S.), in connection with the fact that the relators had in their possession as agents of one George Parish, a resident of Bohemia, a large amount of household furniture, and also *six thousand dollars in money in bank*, and the Court says: "That the furniture in the mansion and *the money in bank* were, under these provisions, properly assessable to the relators is not seriously disputed."

The question of the taxation of deposits of money in bank has also come up in connection with the inheritance tax, and the Court of Appeals of the State of New York (Matter of Romaine, 127 N. Y., 88, and in the present Case), and it is of the opinion that the statute applies both in the letter and in spirit to cases *where deposits of this character are habitually kept within the State of New York*, and thus are afforded protection by the State Government, and that such deposits should be subject to their just proportion of the tax.

See also to the same effect:

Estate of Morejon, 5 N. Y. L. J., 864.
Estate of Boudon, 6 *Id.*, 1322.
Estate of Nicola Simoni, N. Y. L. J., Jan. 20, 1896.

The plaintiffs in error contended below that the relation between the decedent and the trust company was that of debtor and creditor, for the reason that the deposit became the property of the company and the company became indebted for the amount deposited, and such relation was a mere debt, citing the well-known case of State tax on foreign held bonds (15 Wal., 300) to the effect that debts have no situs independent of the domicile of the creditor.

This is repugnant to the laws of New York and the cases already cited, and it is respectfully urged that a wide distinction exists between the ambulatory characteristics of an ordinary debt represented by bonds (the subject matter of the case of the Foreign Held Bonds) or by a promissory note or other evidence of debt in the possession of the non-resident decedent before or at the time of his death, all of which are not within the State nor taxed by the State, and do not require the police protection of the State, and the deposit of money kept habitually and for nineteen (19) years as an investment with an interest paying trust company, a domestic State monetary institution which exacts all the continual safe guards of protection, civil, police and military that can surround it.

Thus the Legislature of New York in making a debt of a domestic corporation "personal property," expressly excepted a debt "evidenced by a bond, "promissory note or other instrument for the pay-"ment of money only, in terms negotiable or payable "to the bearer or holder."

Certainly the money deposited does not so absolutely become the property of the depositary as to disappear and have no ear marks of its owner. If such were the case, how could the Court of Appeals

of the State of New York say in People *v.* Trustees of Ogdensburgh (*supra*), that the money in bank was the money of George Parish and taxable?

If the money was held by the trust company as an investment by the decedent bearing regular interrest the company was to say the least, the agent of the decedent; the deposit was taxable in his lifetime and subject to the transfer tax on the assignment or transfer by the foreign administrator."

If the deposit be an obligation of the trust company then will the special provision of the taxing act (Sec. 9) apply: "If a foreign executor, administrator or trustee shall assign or transfer any stock or *obligations* in this State standing in the name of a decedent * * * the tax will be paid * * * on the transfer thereof."

That the State can separate the property from the owner and make any regulation as to location of property brought voluntarily within the State and kept there we have demonstrated by the authorities cited.

What would this money on deposit be worth were it not for the protection of the civil and the military power of the State? Is it not apparent that the intrinsic and ultimate value of the deposit rests on State authority? Did not a non-resident here voltarily submit himself to the authority of the State of New York? To the extent of the property brought by the non resident into the State of New York did he not become its presumptive citizen as to taxation in so far as his property—the *res*—was concerned? With the presence of the property from its arrival within the State, all the laws of the State of New York relating to the transfer of the property of the owner, living or dead, attached themselves to the property. Should the owner die the State of New York "appropriates for its own use a portion of the property at the moment of its owner's death and only allows the balance to pass (Matter Swift, 137 N. Y., 77).

In order to demonstrate that the money on de-

posit was not within the State, the plaintiff in error relied below on the cases of *in re* Phipps, 59 State Rep., 769, and of Kirtland *vs.* Hotchkiss, 100 U. S., 490, which are easily distinguished from the case at bar.

The matter of Phipps was the case of a non-resident entitled to a legacy in the estate of a resident of the State of New York. The Court said that the right to the legacy had never been reduced to possession and was kept within the State *without the will of the decedent, and hence* not subject to taxation; that Phipps had the right to claim the amount of money which his share of the residuary estate of Mrs. Fogg would result in – nothing more; no particular piece of property, no particular piece of money, no particular representatives of money or property; and that until such residuary estate was ascertained by an accounting of the executors, the legatee might not even be able to maintain an action for its recovery.

In the case at bar, however, the books of the decedent specifically show he brought tangible property here in the shape of money; they show his ownership of the sum of $71,715 deposited by himself in the trust company, and by him voluntarily permitted to remain in this State, invested with an interest paying depositary, a domestic corporation, and that it was within his power to remove the same at any time. For all intents and purposes it did not change its characteristics.

As to the case of Kirtland *vs.* Hotchkiss (100 U. S., 490), the question presented was whether the State could tax personal property of its citizen which was without the State of his domicile, and the Court arrived at the same conclusions as the Court of Appeals of the State of New York in the Matter of Swift, 137 N. Y., 77.

There was no confusion in the commingling by the decedent of the moneys on deposit in the trust company. Decedent created and opened the account himself individually. His own property was

ear marked by himself and distinguishable from the other money. His own books of account showed the deposits made and the exact amount of his own money among the deposits at the time of his death. In any event he held his own money in the account in trust for himself.

The administrator testified that the account was opened January 1, 1876, with the trust company by the decedent as trustee under the will of Edmund Husson; that from time to time he made deposit therein of funds belonging to the trust estate; that in such account also from time to time, as appears in the books of the decedent, he also made deposits of money belonging to himself individually; that at the time of the decedent's death the total amount of said deposits was $73,715, of which there appeared by his said books of account to have been deposited by decedent individually the sum of $71,715, leaving only $2,000 of the money belonging to the estate of Husson.

Here we see money voluntarily brought into this State by a non-resident and voluntarily permitted by him to remain in the State. There was no shadowy claim, no unascertained amount, no mere chose in action, no right to be reduced to possession, no necessity to have the fund administered upon by the administrator, but a particular sum of money, $71,715 shown by the books of the decedent to have been deposited and to be owned by him and on deposit with the trust company.

Nor was the money on deposit in the trust company transiently within the State. The account with the trust company, as testified by the administrator, was opened on or about the 1st day of January, 1876, and it will be noted that there is no evidence that the money of the decedent was only temporarily here, nor that it was here except as an investment. Nor does the administrator claim that the decedent had of his own money on deposit in the account when opened (Jan. 1, 1876), any sum less than the $71,715 of his own

money on deposit at the date of his death, May 21, 1895, and hence we must assume it as admitted that that amount had been kept continuously within the State during such period of time. It was voluntarily left by the decedent for safe keeping, and to gain the interest allowed by the trust company. The mere fact of depositing it in a trust company is evidence of seeking safety, if nothing else. But we can consistently consider the deposit a permanent investment as is the deposit in a savings bank. The administrator certainly has not proved the contrary. Nor has he shown that the pass books were without the State of New York.

As said by the Court of Appeals of the State of York in the Romaine case (127 N. Y., at p. 89): "Such property is within the State in every reasonable sense; receives the protection of its laws and has every advantage from the Government for the support of which taxes are levied, that it would have, had it belonged to a resident. We think a fair construction of the act permits no distinction as to such property, based simply upon the residence of the deceased owner."

Such moneys were not transiently here, as upon the person or in the baggage of a man suddenly dying within this State.

Matter of Enston, 113 N. Y., 182.
Matter of Romaine, 137 N. Y., 88.
Matter of Phipps, 59 St. Rep., 771.

The Court below appropriately said:

What were the rights of the decedent or those of his successors "as against the State of New York in "view of the command of its Legislature that all "property or interest in property within the State, "succeptible of ownership, should be subject to a "transfer tax upon the death of its owner, whether "he was a resident or non-resident? What was the "real thing, the essence of the transaction, which "gave rise to this controversy? The decedent

" brought his money into this State, deposited it in " a bank here, and left it here until it should suit " his convenience to come back and get it. While " the commingling of funds may complicate ad- " ministration. it did not change the facts as thus " stated. If he had deposited in specie, to be re- " turned in specie, there could be no doubt that the " money would be property in this State subject to " taxation. But, instead, he did as business men " generally do, deposited his money in the usual " way, knowing that not the same but the equi- " valent would be returned on demand. While the " relation of debtor and creditor technically existed, " practically he had his money in the bank and " could come and get it when he wanted it. It was " an investment in this State subject to attach- " ment by creditor."

Plimpton *v.* Bigelow, 93 N. Y., 592, 596, 600.

N. Y. Code Civ. Pro., Secs. 648, 2478.

Naser *v.* First Nat. Bk., 36 Hun, 343.

Salter *v.* Weiner, 6 Abb., 191, Clerke, *J.*

Greentree *v.* Rosenstock, 61 N. Y., 583.

Duncan *v.* Berlin, 60 N. Y., 151; 98 N. Y., 87.

" If not voluntarily repaid he could compel pay- " ment through the Courts of this State. The de- " positary was a resident corporation, and the re- " ceiving and retaining of the money were corporate " acts in this State. Its repayment would be a " corporate act in this State. Every right springing " from the deposit was created by the laws of this " State. Every act out of which those rights arise " was done in this State. To enforce those rights it " would have been necessary for the decedent to " come into the State. Conceding that the deposit " was a debt; conceding that it was tangible, still " it was property in the State of New York for all

" practical purposes and in every sense it was
" within the meaning of its Transfer Tax Acts.
" *In re* Romaine, 127 N. Y., 80, 89.
" Also see cases *supra.*

" While distribution of the fund belongs to the
" State where the decedent was domiciled, as such
" distribution cannot be made until his adminis-
" trator has come into this State to get the fund,
" possibly after resorting to the courts for aid in
" reducing it to possession, the fund had a *situs*
" here, because it is subject to our laws. A reason-
" able test in all cases as it seems to me is this:

" Where the right, whatever it may be, has a money
" value and can be owned and transferred, but can-
" not be enforced or converted into money against
" the will of the persons owning the right without
" coming into this State, it is property within this
" State for the purposes of a succession tax. Thus the
" right in question is property, because it is capable
" of being owned and transferred. It is within this
" State, because the owner must come here to get
" it. It is subject to taxation, because it is under
" the control of the laws of the State of New York.
" It has a money value, because it is virtually money
" or can be converted into money upon demand. It
" is subject to a transfer tax, because the passing
" by gift or inheritance of 'all property or interest
" therein whether within or without this State,
" over which this State has any jurisdiction for the
" purpose of taxation,' comes within the express in-
" tention of the Legislature of the State of New
" York."

It has been held in different States that money, while a mere medium of exchange, is, so far as taxation questions are concerned, a form of tangible personal property.

Thus it was held in

Provident Inst. *v* Massachusetts, 6 Wall. (U. S.), 611,

that "the sums received from depositors are deposited within a law imposing a tax upon deposits, whether they have been invested or not, and without reference to their value as compared with any other standard." To the same effect

Cammell *v.* Riviere (Tex., 1893), 22 S. W. Rep., 993.

Campbell *v.* Wiggins, 2 Tex. Civ. App., 1.

State *v.* Earle, 1 Nev., 397.

McCutchen *v.* Rice County, 2 McCrary (U. S.), 337.

Liverpool Ins. Co. *v.* Board, 44 La. Ann., 91.

Matter of McMahon, 66 How. Pr. (N. Y.), 190.

Also cases cited—

Amer. & Eng. Ency. of Law, 25, 200; p. 104, Notes 1, 2 & 3.

III.

The tax imposed under the Taxing Act of the State of New York in question is not repugnant to the fifth amendment of the Constitution of the United States.

The question of the constitutionality of the taxing act was tested in the Matter of McPherson (104 N. Y., 306), in which case the Court of Appeals of the State of New York held the act known as Chapter 483, Laws of 1885, which became incorporated in the present taxing act, was not violative of the State Constitution, and further that it provided "sufficiently for a notice and hearing or opportunity

to be heard," and so does not invade the constitutional right to "due process of law."

See also Weston *v.* Goodrich, 86 Hun, 194.

The same Court in the Matter of Sherwell, 125 N. Y., 379, held that the Legislature is not restricted in the selection of its subjects for the raising of revenue for State uses. In such respects it is sovereign and is without other control than the restriction found in the fundamental law of the State.

A law providing for the taxation of the capital of a non-resident is constitutional.

Duer *v.* Small, 4 Blatchf. (U. S.), 263.

International L. Assurance Co. *v.* Com'rs of Taxation, 28 Barb., N. Y., 318.

See also cases cited Amer. & Eng. Ency. of Law, 25 Taxation, p. 104, notes 1, 2 & 3.

IV.

The tax imposed by the State of New York under its taxing act complained of by the plaintiffs in error was so imposed with due process of law.

Taxation exacts money from individuals as their share of a justly imposed and apportioned public burden while property is taken by the exercise of the right of eminent domain, not as the owner's share of the public property, but as something distinct from and beyond his share, special compensation being required to be made in the latter case because the Government is a debtor for the property so taken, but not in the former because the payment of taxes is a duty which creates no obligation

to repay otherwise than in the proper application of the tax. Constitutionul requirements that provide property shall not be taken for public use without just compensation have reference solely to the exercise of eminent domain.

White *v.* People, 94 Ill., 609.
Hessler *v.* Drainage Com'rs, 53 Ill., 105.
Booth *v.* Woodbury, 32 Conn., 118.
Nicholas *v.* Bridgeport, 23 Conn., 189.
Logansport *v.* Seybold, 59 Ind., 225.
Warren *v.* Henly, 31 Iowa, 31.
Stewart *v.* Polk County, 30 Iowa, 9.
Martin *v.* Dix, 52 Miss., 53; 24 Am. Rep., 661.
People *v.* Brooklyn, 4 N. Y., 419; 55 Am. Dec., 266.
Kittle *v.* Shirvin, 11 Neb., 81.
Hanscom *v.* Omaha, 11 Neb., 37.
Allen *v.* Drew, 44 Vt., 175.
Gillman *v.* Sheboygan, 2 Black (U. S.), 510.

The record shows conclusively that the plaintiffs in error appeared by attorney before the appraiser, and in each subsequent stage of the proceedings of the State of New York.

See pp. 6, 11, 12, 13 and 18 of the printed record.

In conclusion, it is respectfully submitted:

I.—That the highest Court of the State of New York has adjudged the act known originally as the Collateral Inheritance Tax Act (Chap. 483 of the Laws of 1885), and which was subsequently embodied in the Transfer Tax Act (Chap 399, Laws of 1892), to be constitutional.

II.—That although plaintiffs in error duly appeared in the proceeding initiated in the office of the Surrogate of the County of New York

to appraise the property of the decedent subject to the tax, no question of constitutionality was presented to the Surrogate of the County of New York or to the courts of appellate jurisdiction by the plaintiffs in error.

III.—That as shown by the cases cited, there is nothing repugnant to the Constitution of the United States in the imposition of the tax under the Transfer Tax Act of the State of New York in question.

IV.—That as shown by the record the plaintiffs in error have had ample opportunity to be heard, have voluntarily appeared by counsel in the proceedings below, and that the tax imposed and paid by plaintiffs in error was fixed and determined by due process of law.

V.—That the moneys of the decedent were property on deposit in the State of New York, and subject to the provisions of the taxing act.

For these reasons the writ should be dismissed, with costs.

Respectfully submitted,

EMMET R. OLCOTT.
Attorney and of Counsel for the Comptroller of the City of New York, Defendant in Error and Appellee.